Supreme Court of Wisconsin.

FRITZ STEFFEN *v.* THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Negligence is not to be presumed in the absence of evidence tending to prove it. A party charging negligence as the ground of his action takes the *onus probandi*. But the nature of the injury may in some cases raise a presumption of negligence.

A servant who engages in the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services. But where there are latent risks which are known to the master it is his duty to notify the servant. And when they arise from no negligence of the master but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master.

APPEAL from Dane county.

Jones and *Parkinson*, for respondent.

Smith and *Lamb*, for appellant.

RYAN, C. J.—The respondent brought his action for the appellant's negligence, and it was incumbent on him to establish it. Negligence is not to be presumed in the absence of evidence tending to prove it. A plaintiff charging negligence as the ground of his action takes the *onus probandi*. The nature of an injury may indeed, in some cases, raise a presumption of negligence. But the respondent's injury is not of such a character. He established no cause of action without evidence tending to show the appellant's negligence in causing his injury: Wharton's Neg., sect. 421; *Morrison* v. *P. & C. Construction Co.*, 44 Wis. 405; *Nitro-Glycerine Case*, 15 Wall. 524.

As the respondent's evidence left the case, his injury appeared the result of unaccountable accident. There was no evidence tending to show where the stone which struck him came from, or how or by what it was put in motion. The whole body of the evidence rendered it most improbable, indeed nearly or quite impossible, that it could have come from that part of the track between the rails, by force of the passing train. All the gravel on that part of the track appears to have been several inches below the cow-catcher, the lowest part of the train. And there was nothing to show that the stone could have come from that part of the track outside of the rails. The cause of the accident rested in pure conjecture, without evidence tending to explain it or to connect it

in any way with any negligence of the appellant. At the close of the respondent's evidence it appeared to be a case of unaccountable misadventure, for which no one was responsible: *Harvey* v. *Dunlap*, Supplt. to Hill & Denio 193; *Brown* v. *Kendall*, 6 Cush. 292; *Nitro-Glycerine Case*, *supra*; and a nonsuit ought to have been granted when the respondent rested.

The appellant, however, gave evidence of some experiments tending to account for the injury. These experiments raise some presumption, perhaps a strong one, that the stone came from the outside of the rail, next to and nearly or quite directly opposite the respondent where he was struck. It appears that such stones, placed on the head of a spike and rested against the outside of the rails, were several times driven by a passing train, at a right angle or nearly so from the rail, with force enough to cause such an injury at such a distance. If these experiments do not account for the accident, it still remains unaccountable. And the case will be considered on the presumption which the experiments raise.

The negligence imputed to the appellant is the failure of the boss of some workmen, of whom the respondent was one, to remove the stone upon the approach of the train, so that the injury could not have occurred. If the boss of a gang of mere laborers, himself little or no more, should be held chargeable with notice of such a danger, the law would impute to him knowledge of a law of motion quite new to every member of the court upon the argument of this appeal. But the evidence *prima facie* establishes that, if leaving such a stone in such a place were negligence, it was the negligence of the respondent himself.

The learned counsel for the respondent dwelt much upon the duty of the appellant to keep its track in order. There is no necessity to insist upon the duty of a railroad company to keep its track in good order, for the purposes for which it is built; the safe passage of trains. And these workmen appear to have been employed to perform this very duty for the appellant, at the *locus in quo*. The track had been raised, and the men were engaged in ballasting it with gravel lying at the side of the track. It appears to have been the duty of each man so employed to shovel gravel upon the track in front of him, until there should be enough so shovelled up as to need levelling on the track, and thereupon to level it from time to time, as might be necessary; each workman for himself, to the extent of his own work. This appears to have

been mere labor, not skilled labor in any sense. And the office of the boss appears to have been chiefly or wholly to see that the men under him performed their duty.

Assuming the theory of the experiments, the stone which injured the respondent was, in the absence of evidence to the contrary, presumably thrown up by himself, in his own immediate front; and if it should have been removed from the tie, it was his own duty to remove it. Indeed it seems to have been impracticable for the boss of the work to examine the work in detail, at the approach of trains, in order to guard against such possibilities as the one in question, without keeping his men idle a great part of their time. His first and paramount duty of supervision was to see the track safe for passing trains. And before the happening of this accident no rule of ordinary care could well have required him to inspect the track outside of the rails, at the approach of every train.

The relation of master and servant does not imply the master's guaranty of the servant's safety. "A servant," says BLACKBURN, J., in *Morgan* v. *Railway Co.*, 5 B. & S. 570, "who engages in the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services." This rule is universal: Wharton's Neg., sect. 201, 205; *Strahlendorf* v. *Rosenthal,* 30 Wis. 674; *Priestly* v. *Fowler*, 3 Mees. & Wels. 1; *Riley* v. *Baxendale*, 6 Hurlst. & N. 445; *Woodley* v. *Railway Co.*, Law Rep. 2 Ex. 384; *Gibson* v. *Railway Co.*, 63 N. Y. 449; *Hayden* v. *Man'fg Co.*, 29 Conn. 548; *Ladd* v. *Railroad Co.*, 119 Mass. 412.

There may be latent risks in an employment. Where these are known to the master, it is his duty to notify the servant. But when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant; not with the master: Wharton's Neg., 206–211.

Whether the injury of the respondent arose from unaccountable accident, or from an occult risk incident to his employment, the respondent is not entitled to recover. And the appellant's second motion for a nonsuit, at the close of the evidence, should have been granted.

The judgment is reversed and the cause remanded to the court below for a new trial.